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Nos. 09-784 and 09-804

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In the Supreme Court of the United States

JANICE C. AMARA, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PETITIONERS

v.

CIGNA CORPORATION, ET AL.

CIGNA CORPORATION, ET AL., PETITIONERS

v.

JANICE C. AMARA, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether participants in an employee benefit plan covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, who make an unrebutted showing of likely harm from material misrepresentations in a summary plan description (SPD) may recover benefits based on the inconsistency between the SPD and the plan terms as described in other plan documents.

2. Whether the district court abused its discretion in basing the amount of the participants' recovery on the SPD misrepresentations rather than awarding larger amounts based on additional misrepresentations in a notice required by Section 204(h) of ERISA, 29 U.S.C. 1054(h) (2000), or a summary of material modifications.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Discussion 10
A. The issues in No. 09-804 do not warrant this Court's review 11
B. The issues in No. 09-784 do not warrant this Court's review 19
C. The Court need not grant, vacate, and remand in light of *Conkright* 22
Conclusion 23

TABLE OF AUTHORITIES

Cases:

Aiken v. *Policy Mgmt. Sys. Corp.*, 13 F.3d 138 (4th Cir. 1993) 17
Alday v. *Container Corp. of Am.*, 906 F.2d 660 (11th Cir. 1990), cert. denied, 498 U.S. 1026 (1991) ... 11
Bergt v. *Retirement Plan for Pilots Employed by MarkAir, Inc.*, 293 F.3d 1139 (9th Cir. 2002) 11
Branch v. *G. Bernd Co.*, 955 F.2d 1574 (11th Cir. 1992) 15
Burke v. *Kodak Ret. Income Plan*, 336 F.3d 103 (2d Cir. 2003), cert. denied, 540 U.S. 1105 (2004) 8, 12, 13, 14
Burstein v. *Retirement Account Plan*, 334 F.3d 365 (3d Cir. 2003) 11, 12, 17
Chiles v. *Ceridian Corp.*, 95 F.3d 1505 (10th Cir. 1996) 11, 17
Conkright v. *Frommert*, 130 S. Ct. 1640 (2010) 15, 22

Cases—Continued: Page

Curtiss-Wright Corp. v. *Schoonejongen*, 514 U.S. 73 (1995) 11, 12, 16
Edwards v. *State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134 (6th Cir. 1988) 17
Govoni v. *Bricklayers, Masons & Plasterers Int'l Union of Am.*, 732 F.2d 250 (1st Cir. 1984) 17
Harris v. *Blue Cross Blue Shield*, 995 F.2d 877 (8th Cir. 1993) 17
Heffner v. *Blue Cross & Blue Shield*, 443 F.3d 1330 (11th Cir. 2006) 15
Hightshue v. *AIG Life Ins. Co.*, 135 F.3d 1144 (7th Cir. 1998) 17
Jensen v. *SIPCO, Inc.*, 38 F.3d 945 (8th Cir. 1994), cert. denied, 514 U.S. 1050 (1995) 11
Kennedy v. *Plan Admin. for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009) 11
National Ass'n of Home Builders v. *Defenders of Wildlife*, 551 U.S. 644 (2007) 12
Pierce v. *Security Trust Life Ins. Co.*, 979 F.2d 23 (4th Cir. 1992) 13
Schad v. *Stamford Health Sys., Inc.*, No. 08-5962-cv, 2009 WL 4981271 (2d Cir. Dec. 21, 2009) 13
Washington v. *Murphy Oil USA, Inc.*, 497 F.3d 453 (5th Cir. 2007) 17

Statutes and regulations:

Economic Growth and Tax Relief Reconciliation Act, Pub. L. No. 107-16, § 659, 115 Stat. 137-141 2

Statutes and regulations—Continued: Page

Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* 2
29 U.S.C. 1001 12
29 U.S.C. 1001(a) 11
29 U.S.C. 1001(b) 11
29 U.S.C. 1001a 12
29 U.S.C. 1022 11
29 U.S.C. 1022(a) 2, 3, 11
29 U.S.C. 1022(b) 3
29 U.S.C. 1024(b) 3
29 U.S.C. 1024(b)(2) 11
29 U.S.C. 1024(b)(4) 11
29 U.S.C. 1054(h) (Section 204(h)) ..... *passim*
29 U.S.C. 1054(g) 4
29 U.S.C. 1054(h)(1) (2000) 2
29 U.S.C. 1054(h)(2) 2
29 U.S.C. 1054(h)(3) 2
29 U.S.C. 1054(h)(6) 2, 18, 21
29 U.S.C. 1102(b)(3) 16
29 U.S.C. 1104(a)(1)(D) 12, 16
Pension Protection Act of 2006, Pub. L. No. 109-280, § 701(a), 120 Stat. 981 4
29 U.S.C. 1054(b)(5)(B)(iii) 4, 18, 20
26 C.F.R.:
Section 1.411(d)-6 Q&A-10 (1999) 2
Section 1.411(d)-6T, Q&A-10 (1997) 2
29 C.F.R. 2520.102-2(b) 3

Miscellaneous: Page

Peter J. Wiedenbeck, *ERISA in the Courts* (2008) 11

In the Supreme Court of the United States

No. 09-784

JANICE C. AMARA, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PETITIONERS

v.

CIGNA CORPORATION, ET AL.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petitions for a writ of certiorari should be denied.

STATEMENT

1. Under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, a defined benefit pension plan generally may not be amended to reduce significantly the rate of future benefit accrual unless the plan administrator provides the notice to participants required by Section 204(h) of ERISA, 29 U.S.C. 1054(h). Until 2001, that notice had to "set[] forth the plan amendment and its effective date," 29 U.S.C. 1054(h)(1) (2000), which meant that the notice had to include either the amendment's text or an understandable summary. 26 C.F.R. 1.411(d)-6, Q&A-10 (1999); 26 C.F.R. 1.411(d)-6T, Q&A-10 (1997). The pre-2001 version of Section 204(h) did not address the remedy for a violation of the notice requirement. Under amendments to Section 204(h) enacted in 2001, Economic Growth and Tax Relief Reconciliation Act, Pub. L. No. 107-16, § 659, 115 Stat. 137-141, the notice must now provide sufficient information, as determined by the Secretary of Treasury, to allow individuals to understand the effect of the plan amendment. 29 U.S.C. 1054(h)(2) and (3). Section 204(h) also now specifies that, in the case of an "egregious failure" to satisfy its requirements, the plan shall be applied as if it entitled affected individuals to the greater of the benefits to which they would have been entitled absent the amendment or the benefits under the plan as provided by the amendment. 29 U.S.C. 1054(h)(6).

ERISA further requires the administrator of an employee benefit plan to give participants a summary plan description (SPD) and a summary of any material modifications (SMM) that are "sufficiently accurate and comprehensive to reasonably apprise [them] * * * of their rights and obligations under the plan." 29 U.S.C.

1022(a). The SPD must provide notice of, among other things, "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits," 29 U.S.C. 1022(b), and the SMM must provide notice of changes in those circumstances, 29 U.S.C. 1022(a). The SPD and SMM must "be written in a manner calculated to be understood by the average plan participant," 29 U.S.C. 1022(a), and "must not have the effect [of] misleading, misinforming or failing to inform participants." 29 C.F.R. 2520.102-2(b). See 29 U.S.C. 1024(b).

2. a. During 1997 and 1998, CIGNA Corporation converted its traditional defined benefit pension plan to a cash balance plan, an alternative form of defined benefit pension plan. Pet. App. 16a-17a.[1] In a traditional defined benefit plan, each employee's benefit is generally defined as an annuity beginning at normal retirement age and calculated based on the employee's compensation and years of service. *Id.* at 9a. In a cash balance plan, each employee's benefit is generally defined by reference to the amount in a hypothetical account. The balance in that account typically increases over time with hypothetical contributions—pay credits, which are based on a percentage of the employee's compensation, and interest credits, which are based on application of a specified interest rate to the hypothetical account balance. *Id.* at 12a.

In converting to the cash balance plan, CIGNA used a transition method called the "greater of A or B." Under that approach, CIGNA first amended the plan to freeze the benefits that employees had accrued under the traditional defined benefit formula (Part A) and then

[1] Unless otherwise noted, "Pet." and "Pet. App." refer to the petition and appendix in No. 09-804.

amended the plan to provide that, going forward, employees would receive the greater of those frozen benefits (which ERISA prohibited CIGNA from reducing, 29 U.S.C. 1054(g)) or the benefits due under a new cash balance formula (Part B). Pet. App. 13a-14a, 16a-22a. An alternative transition method, called "A plus B," would have been more favorable to employees. Under that approach, after the conversion, CIGNA would have paid employees both their frozen accrued benefits under the traditional formula (Part A) and additional benefits under the new cash balance formula (Part B). *Id.* at 13a. Although ERISA permitted the "greater of A or B" approach at the time of CIGNA's conversion, ERISA no longer permits that approach. For any conversion after June 29, 2005, participants' post-conversion benefits cannot be less than those provided by the "A plus B" approach. Pension Protection Act of 2006 (PPA), Pub. L. No. 109-280, § 701(a), 120 Stat. 981, 29 U.S.C. 1054(b)(5)(B)(iii).

b. CIGNA implemented the "greater of A or B" approach by creating an opening balance for each participant under Part B based on the participant's accrued benefit under Part A. Pet. App. 19a. Because of CIGNA's choice of discount rates and mortality risk adjustments, however, as well as its decision not to include the value of certain benefits, a participant's Part B opening account balance was frequently much less than the present value of the participant's Part A accrued benefit at the time of the conversion. *Id.* at 23a, 121a-123a.

As a result of CIGNA's plan design decisions, as well as declining interest rates in the years following the conversion, many employees experienced an extended period during which their Part B benefit was less than the then-present value of their frozen Part A accrued bene-

fit. Pet. App. 23a-25a. During this period, affected employees continued to work, and their hypothetical cash balance accounts continued to grow, but, until the cash balance accounts caught up with the previously accrued benefits under Part A, they earned no additional retirement benefits beyond what they had already earned. *Id.* at 25a. Some employees experienced several years of working without accruing additional benefits, and, in some cases, employees were never able to "wear away" the difference between their frozen Part A benefits and their benefits under Part B. *Id.* at 25a-26a.

CIGNA was aware that the amended plan could result in "wear away" periods during which employees would work without actually accruing additional benefits, but CIGNA did not inform employees about that possibility. Pet. App. 29a, 118a-119a. Instead, CIGNA provided materially misleading statements suggesting that employees would continue to accrue additional benefits as they worked, with no "wear away" periods. *Id.* at 126a-127a. In a November 1997 newsletter, which CIGNA later identified as the notice required by ERISA Section 204(h), *id.* at 95a, CIGNA stated that the conversion would "significantly enhance its retirement program." *Id.* at 31a. The newsletter said that "the new plan is designed to work well for *both* longer- and shorter-service employees" and provides "benefit growth throughout [an employee's] career." *Ibid.* (brackets in original).

In December 1997, CIGNA sent each participant a retirement kit, which CIGNA later identified as the required SMM. Pet. App. 33a, 95a. Like the newsletter, the retirement kit described the changes to CIGNA's retirement program as enhancements. *Id.* at 34a. Although the kit provided details about the calculation of

opening balances under Part B, it did not describe all of the discounts applied in calculating those balances. *Id.* at 35a. In addition, it stated that "[e]ach dollar's worth of credits is a dollar of retirement benefits payable to [participants] after [they] are vested," *id.* at 36a; that the new plan generally provides "larger benefits for shorter-service employees and comparable benefits for longer-service employees," *id.* at 37a; and that participants "will see the growth in [their] total retirement benefits from CIGNA every year." *Ibid.*

In October 1998 and September 1999, CIGNA issued SPDs for the cash balance plan. Pet. App. 39a. The SPDs stated that "[e]ach dollar's worth of credit is a dollar of retirement benefits payable to [participants] after [they] are vested," and reported that amounts in a participant's account "continue to grow every year [the participant is] with CIGNA." *Id.* at 39a-40a, 126a.

CIGNA was aware that employees lacked full information about the true effects of the conversion to the cash balance plan, including "wear away" and a lower accrual rate for many participants, but chose not to inform employees about those effects in order to ease the transition to the amended plan. Pet. App. 110a-113a. CIGNA wanted to avoid possible employee protests, which CIGNA was aware had caused some other employers to abandon or scale back similar conversions to cash balance plans. *Id.* at 113a-114a.

3. a. In 2001, Janice C. Amara and other plan participants brought a class action lawsuit against CIGNA and its pension plan (together CIGNA) in the United States District Court for the District of Connecticut. Pet. App. 41a. As relevant here, the plaintiffs alleged that, in converting to the cash balance plan, CIGNA had failed to comply with the notice requirements of ERISA Section

204(h), as well as ERISA's SPD and SMM provisions. *Id.* at 94a.

b. In February 2008, after an extensive bench trial, the district court determined that CIGNA had violated Section 204(h) and the SPD and SMM requirements. Pet. App. 5a-159a.

The court declined to decide whether the version of Section 204(h) in effect at the time of the conversion required explicit notice that benefits were being reduced or that participants might experience periods of "wear away" under the amended plan. Pet. App. 103a-104a. The court concluded that, even if those affirmative disclosures were not required, CIGNA's Section 204(h) notice failed to comply with ERISA's requirements because it included "material misrepresentations suggesting benefit increases" and indicating that "reductions in the rate of future benefit accrual were not a component or a possible result" of the conversion. *Id.* at 104a-106a.

The district court determined that CIGNA's SPDs and SMM likewise failed to comply with ERISA's requirements because the documents did not disclose the possibility of "wear away" periods, even though CIGNA knew that a sizeable number of employees were likely to experience such periods because of the amended plan's design. Pet. App. 118a-126a. Moreover, even assuming that CIGNA had no affirmative duty to inform participants about "wear away," the court found that the SPDs and SMM contained "materially misleading statements" that led participants to believe that they would steadily earn additional benefits under the amended plan. *Id.* at 126a-128a. The court further found that the documents contained misrepresentations that led participants to believe that all benefits accrued under the traditional plan, including early retirement benefits, would be in-

cluded in determining opening account balances under the cash balance plan. *Id.* at 128a-131a.

The court rejected CIGNA's argument that the participants were not entitled to relief because they had failed to demonstrate injury. Pet. App. 131a-137a. The court noted that, under *Burke* v. *Kodak Retirement Income Plan*, 336 F.3d 103 (2d Cir. 2003), cert. denied, 540 U.S. 1105 (2004), a participant may recover based on a deficient SPD only if the participant establishes likely prejudice or harm. Pet. App. 131a-132a. If a participant shows likely harm, the court explained, "the employer may rebut [that showing] through evidence that the deficient SPD was in effect a harmless error." *Id.* at 132a (quoting *Burke*, 336 F.3d at 113). The court found that the participants collectively had shown likely harm and that CIGNA had failed to establish harmless error. *Id.* at 133a-137a. The court reasoned that CIGNA's successful efforts to conceal the full effects of the cash balance transition had deprived employees of the opportunity to take timely action in response, including protesting when the new plan was implemented. *Id.* at 137a; see *id.* at 112a-114a (finding that CIGNA deliberately misinformed employees about the effects of the conversion and thereby successfully avoided protests that had led other companies to roll back conversion plans).

c. In June 2008, the district court issued an opinion addressing the appropriate remedy. Pet. App. 160a-221a. The court concluded that no individual issues remained regarding whether participants were harmed by the SPD violations. *Id.* at 162a-169a. The court rejected as contrary to Second Circuit precedent CIGNA's argument that each plan participant should be required to prove detrimental reliance. *Id.* at 165a n.1. The court also declined to afford CIGNA an additional opportunity

to prove harmless error because CIGNA had failed to take advantage of its earlier opportunities to rebut the participants' showing of likely harm. *Id.* at 166a. In particular, the court noted, CIGNA had declined to engage in discovery that the court had authorized to determine whether class members had actual knowledge of the undisclosed information about the cash balance plan, and CIGNA had decided not to call any participants as witnesses at trial. *Ibid.*

As a remedy for the SPD and SMM violations, the court ordered CIGNA to provide benefits under the "A plus B" approach. Pet. App. 194a-201a. The court reasoned that using that approach would eliminate "wear away" and rectify CIGNA's misrepresentation about the opening balances under the cash balance plan. *Id.* at 195a-197a. The court declined to provide an additional remedy for the SMM's statement that benefits under the post-conversion plan would be "comparable" to prior benefits. *Id.* at 200a-201a.

As for the Section 204(h) violation, the court concluded that the appropriate remedy was to require CIGNA to issue new notices that comply with the requirements of Section 204(h) as amended in 2001. Pet. App. 184a-194a. The court declined to order further relief requested by the plaintiffs because that would have required invalidation of the initial amendment freezing benefits under the pre-conversion plan, which the plaintiffs had not independently challenged, *id.* at 187a-191a, and because the remedy for the SPD and SMM violations provided participants with substantial relief, *id.* at 192a.

4. In an unpublished order, the court of appeals affirmed the district court's rulings. Pet. App. 1a-4a. The

court of appeals relied on "substantially the reasons stated" by the district court. *Id.* at 4a.

DISCUSSION

This Court should deny both petitions for a writ of certiorari. The Court's review is not warranted to examine the Second Circuit's summary order, which affirmed the district court's fact-specific remedial decision. The courts of appeals uniformly agree that an SPD controls over conflicting plan terms. Although the courts disagree on the extent to which participants must show prejudice or reliance to recover benefits as described in the SPD, this case is not an appropriate vehicle to resolve that question. Other courts of appeals have addressed remedial issues concerning misleading SPDs in situations far removed from the facts here; and those courts would not necessarily have reached a different result than the court below in this factual setting, which involves class-wide harm from inaccurate disclosure of a plan amendment concerning future accrual of pension benefits. Moreover, the plan amendment in this case adopted a method of converting to a cash balance plan that is now illegal under ERISA and which is therefore not likely to recur. In addition, even if the relief awarded by the district court were not available as a remedy for CIGNA's SPD violations, that court could award similar relief for CIGNA's violation of the notice requirement in ERISA Section 204(h), which specifically governs plan amendments of the sort at issue here. And the district court's decision on the Section 204(h) remedy has little prospective significance because Congress has since amended that provision as well.

A. The Issues In No. 09-804 Do Not Warrant This Court's Review

1. Contrary to CIGNA's contention (Pet. 21-24), the courts below applied the correct standard for determining when participants may obtain benefits based on an SPD that conflicts with the plan terms as described in other documents.

The SPD is the central mechanism for achieving one of ERISA's fundamental goals—ensuring that participants accurately understand their rights and obligations under the plan. *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 83 (1995); see 29 U.S.C. 1001(a) and (b), 1022. As this Court and the courts of appeals have consistently recognized, the SPD is one of the "documents and instruments governing the plan." *Kennedy* v. *Plan Admin. for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 877 (2009); see *Bergt* v. *Retirement Plan for Pilots Employed by MarkAir, Inc.*, 293 F.3d 1139, 1143 (9th Cir. 2002); *Chiles* v. *Ceridian Corp.*, 95 F.3d 1505, 1511 (10th Cir. 1996); *Jensen* v. *SIPCO, Inc.*, 38 F.3d 945, 949 (8th Cir. 1994), cert. denied, 514 U.S. 1050 (1995); *Alday* v. *Container Corp. of Am.*, 906 F.2d 660, 665-666 (11th Cir. 1990), cert. denied, 498 U.S. 1026 (1991); 29 U.S.C. 1024(b)(2) and (4). Indeed, because the SPD is frequently the only document describing the plan's terms that participants ever receive, see Peter J. Wiedenbeck, *ERISA in the Courts* 84 (2008), ERISA "contemplates that the [SPD] will be an employee's primary source of information regarding employment benefits." *Burstein* v. *Retirement Account Plan*, 334 F.3d 365, 378 (3d Cir. 2003) (citation omitted). ERISA therefore requires the SPD to contain an "accurate and comprehensive" description of participants' "rights and obligations under the plan." 29 U.S.C. 1022(a).

ERISA also requires that, in determining rights and benefits under the plan, the administrator act "in accordance with the documents and instruments governing the plan" and ERISA's other requirements, including the requirement that the SPD accurately reflect participants' rights. 29 U.S.C. 1104(a)(1)(D); see *Curtiss-Wright*, 514 U.S. at 82-83. Accordingly, a plan administrator would violate ERISA by interpreting the plan's terms to deny or restrict benefits to which the SPD states participants are entitled. For these reasons, the eleven courts of appeals that have considered the question have uniformly agreed that, when the SPD conflicts with less favorable terms described in other plan documents, the SPD controls. See *Burstein*, 334 F.3d at 378 & n.18 (citing cases).

Nonetheless, as the Second Circuit recognized in *Burke* v. *Kodak Retirement Income Plan*, 336 F.3d 103 (2003), cert. denied, 540 U.S. 1105 (2004), employees cannot collect additional benefits based on a conflict between the SPD and less favorable plan terms unless the employees have been prejudiced by the SPD violation. That rule is consistent with the general principle that courts do not provide relief for harmless errors. See *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 659-660 (2007). A contrary rule would provide a windfall for some employees at the expense of plans and their sponsors. That, in turn, could adversely affect the solvency of plans or discourage employers from creating them, contrary to other important goals of ERISA. See 29 U.S.C. 1001, 1001a.

The Second Circuit has also adopted the appropriate framework for discerning when SPD errors are harmless. The participant first bears the burden of showing that he was likely harmed as a result of the deficient

SPD. *Burke*, 336 F.3d at 113. In this case, for example, the plaintiffs showed that the SPDs likely led participants to hold erroneous beliefs about their benefit accruals under the cash balance plan, which both affected the terms under which participants believed they continued to work for CIGNA and deprived them of the opportunity to take timely action in response to CIGNA's adoption of an amendment that significantly altered plan terms. Pet. App. 137a. In particular, the district court found that CIGNA's misrepresentations dissuaded participants from protesting the conversion to the cash balance plan, action that had resulted in rollbacks of similar proposed conversions at other companies. *Id.* at 113a-114a. Even after a participant has shown likely harm, however, the plan and its administrator can defeat the claim for additional benefits by showing that the SPD error was actually harmless. *Burke*, 336 F.3d at 113. For example, they might show that the participant had actual knowledge of the less favorable plan terms, *e.g.*, *Schad* v. *Stamford Health Sys., Inc.*, No. 08-5962-cv, 2009 WL 4981271, * 2 (2d Cir. Dec. 21, 2009), or that accurate SPDs were issued before the purportedly inaccurate ones could have had any adverse effect, *e.g.*, *Pierce* v. *Security Trust Life Ins. Co.*, 979 F.2d 23, 30 (4th Cir. 1992).[2]

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[2] Because the Second Circuit requires employees to prove likely harm before they can recover and further allows employers to preclude recovery by establishing that any violation was actually harmless, CIGNA is incorrect in arguing (Pet. 22) that the Second Circuit's approach is functionally equivalent to strict liability. Although CIGNA contends (*ibid.*) that some participants suffered no actual harm, the district court found that CIGNA failed to take advantage of the opportunities it was given to rebut the participants' showing of likely harm. See Pet. App. 166a.

The Second Circuit's approach is consistent with ERISA and the Department of Labor's regulations, which "place the burden on employers to draft an SPD that is accurate, comprehensible, and clear regarding restrictions on eligibility for benefits." *Burke*, 336 F.3d at 113. This approach also appropriately reflects the reality that an employee's accrual of pension benefits is part of the compensation offered by the employer for the employee's services. The terms of those benefits must be accurately reflected in the SPD and SMM. It is therefore fair to give effect to the SPD and SMM unless the employee knew of the less favorable plan terms and understood that they would govern.

The Second Circuit's approach also appropriately takes into account the genuine difficulty participants would face in proving precisely how they were affected by inaccurate disclosures, sometimes years after the fact. For example, many participants rely on oral representations and discussions with friends, coworkers, and colleagues for information about the plan. As a result, misstatements in SPDs can be propagated throughout the workplace and influence even employees who do not read them. Similarly, even if just a minority of participants would have read, communicated, or objected to the amended terms of the plan as described in an accurate SMM, the failure to correctly describe the amendment can have a widespread impact on participants; for example, by depriving them of the opportunity to protest and thereby secure the reversal of adverse changes to the plan—as the district court concluded occurred here. Pet. App. 113a-114a.

The Second Circuit's approach correctly declines to require each individual participant to prove detrimental reliance on the defective SPD. Because giving effect to

plan terms that conflict with the SPD violates ERISA, a rule giving effect to less favorable terms unless employees prove detrimental reliance on the SPD would not be consistent with the statutory scheme. Requiring proof of actual reliance would also undermine ERISA's fundamental goals. Beneficiaries would frequently be unable to satisfy that burden—especially beneficiaries of deceased participants who are unlikely to have evidence that the participants actually read the SPD and acted differently in response. *E.g.*, *Branch* v. *G. Bernd Co.*, 955 F.2d 1574, 1579-1580 & n.2 (11th Cir. 1992). At the same time, administrators would have little incentive to ensure the accuracy of the SPDs they are required by ERISA to furnish, which would frustrate ERISA's goal that participants understand their benefits.

Finally, a requirement that participants demonstrate individualized reliance would also be contrary to ERISA's broader goals of ensuring efficiency, predictability, and uniformity in plan administration, see *Conkright* v. *Frommert*, 130 S. Ct. 1640, 1649 (2010). A reliance requirement would likely preclude class treatment of SPD benefit claims, see *Heffner* v. *Blue Cross & Blue Shield*, 443 F.3d 1330, 1340 (11th Cir. 2006), and cause benefits under a single plan to vary based on the memories of individual participants and their ability to document how they acted in response to inaccuracies in the SPD.

2. CIGNA is mistaken in arguing (Pet. 23) that the decision below conflicts with this Court's decision in *Curtiss-Wright*. In *Curtiss-Wright*, the district court concluded that a revision to an SPD purporting to terminate health benefits was an invalid plan amendment because neither the SPD nor the other plan documents contained an amendment procedure, and the court of

appeals affirmed. 514 U.S. at 75-77. This Court reversed, agreeing with the employer that a provision in the plan's constitution, which gave the company the right at any time to amend the plan, satisfied the requirement in 29 U.S.C. 1102(b)(3) that every plan specify an amendment procedure. 514 U.S. at 78-81. The Court remanded for the lower courts to decide whether the appropriate company officials had approved the new SPD provision. *Id.* at 85.

As noted above, eleven courts of appeals have held that the SPD controls when it materially conflicts with plan terms that are less favorable to participants, and none has viewed *Curtiss-Wright* as an impediment to that holding. The conclusion that the SPD trumps inconsistent plan terms presents no conflict with *Curtiss-Wright* because that conclusion does not rest on the theory that the SPD has formally amended the plan. Instead, as described above, it rests on the legal proposition that a plan administrator cannot give effect to less favorable plan terms that conflict with the SPD without violating ERISA's command that the administrator act in accordance with governing plan documents and ERISA's requirements. See 29 U.S.C. 1104(a)(1)(D).[3]

3. As CIGNA notes (Pet. 12-20), other courts of appeals have taken somewhat different views than the Second Circuit of what additional showing, if any, a participant must make to obtain benefits based on a material conflict between the SPD and the plan terms as described in other plan documents. Five circuits (the First, Fourth, Seventh, Eighth, and Tenth) require a participant to show "significant reliance upon, or possi-

[3] Unlike this and other cases that give effect to more favorable terms in SPDs, the new SPD provision in *Curtiss-Wright* was less favorable to participants.

ble prejudice flowing from, the faulty plan description." *Govoni* v. *Bricklayers, Masons & Plasterers Int'l Union of Am.*, 732 F.2d 250, 252 (1st Cir. 1984) (Breyer, J.); *Aiken* v. *Policy Mgmt. Sys. Corp.*, 13 F.3d 138, 142 (4th Cir. 1993); *Hightshue* v. *AIG Life Ins. Co.*, 135 F.3d 1144, 1149 (7th Cir. 1998); *Harris* v. *Blue Cross Blue Shield*, 995 F.2d 877, 880 (8th Cir. 1993); *Chiles*, 95 F.3d at 1519. The Eleventh Circuit requires proof of detrimental reliance. See *Heffner*, 443 F.3d at 1340. And three circuits (the Third, Fifth, and Sixth) do not require any further showing beyond a material and clear conflict between the SPD and plan terms. See *Washington* v. *Murphy Oil USA, Inc.*, 497 F.3d 453, 458-459 & n.2 (5th Cir. 2007); *Burstein*, 334 F.3d at 380-382; *Edwards* v. *State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 135, 137 (6th Cir. 1988).

Although this Court's intervention may be warranted at some point to resolve this disagreement among the courts of appeals, this case is not an appropriate vehicle to resolve it, for four related reasons. First, this case presents the issue in an unusual factual setting that is not likely to recur. CIGNA's SPDs misrepresented that the method it had chosen to convert from its traditional defined benefit plan to a cash balance plan would not cause employees to experience "wear away" periods in which they would work without accruing additional retirement benefits. Those misrepresentations harmed all affected employees by preventing a critical mass from mounting the kind of protest that had led other companies to revise cash balance conversions that had similarly disadvantaged participants. Indeed, the district court found that CIGNA withheld accurate information from employees to avoid that very consequence. See Pet. App. 113a-114a. No court of appeals that applies a

significant reliance or possible prejudice standard has considered this type of situation, and those courts might well agree with the courts below that such harm is sufficient to entitle affected employees to relief. But other courts are not likely to consider the issue in comparable circumstances because a cash-balance transition with "wear away" is now illegal. See p. 4, *supra* (describing PPA, 29 U.S.C. 1054(b)(5)(B)(iii)).

Second, the 2001 amendments to ERISA Section 204(h) specifically address the question of remedy in a case like this one, which involves defective notice of a plan amendment reducing the future accrual of benefits. The statute now expressly provides that such an amendment cannot be given effect if there is an "egregious" violation of the notice requirements. 29 U.S.C. 1054(h)(6). The consequences of violations like the one at issue here will now be addressed primarily under that special standard.

Third, CIGNA's failure to take advantage of opportunities to discover whether individual class members were actually harmed makes it unclear whether the Second Circuit's standard made a difference in this case. CIGNA argues that the result would have been different in the First, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits because those courts require every participant "to make an individualized showing that they relied on or were prejudiced by" the defective SPDs. Pet. 19. But the district court declined to undertake individualized inquiries here because CIGNA had failed to take advantage of earlier opportunities to discover whether individual class members were actually harmed by the SPDs. Pet. App. 166a. The court of appeals affirmed based on the district court's reasoning. *Id.* at 4a. It therefore cannot be determined whether CIGNA's liabil-

ity resulted from a difference between the Second Circuit's standard and those applied by other circuits or, instead, from CIGNA's own litigation decisions.

Finally, the likely harm issue may be irrelevant to the outcome here because CIGNA not only violated ERISA's SPD requirements but also made similar misrepresentations that violated Section 204(h). The district court recognized that it had the legal authority to remedy the Section 204(h) violation by reinstating the pre-conversion benefit formula. Pet. App. 187a-191a. The court decided not to provide that remedy for the Section 204(h) violation, however, in part because that would have required invalidation of the initial amendment freezing benefits under the pre-conversion plan, which the plaintiffs had not independently challenged, *id.* at 188a-189a, but also because the remedy for the SPD violation already provided participants with significant relief, *id.* at 192a. If the SPD remedial issue were resolved in CIGNA's favor, and participants could no longer receive additional benefits as a remedy for the SPD violation, the district court might well reconsider its choice of remedy for the Section 204(h) violation and choose a remedy comparable to the one it originally provided for the SPD violation.

This Court should deny CIGNA's petition for a writ of certiorari.

B. The Issues In No. 09-784 Do Not Warrant This Court's Review

The Court should also deny the Amara plaintiffs' petition. They make no claim that the decision below conflicts with any decision of this Court or another court of appeals. Instead, they raise only fact-specific chal-

lenges to the district court's remedial decision that do not warrant this Court's review.

The district court provided a fair remedy tailored to CIGNA's misrepresentations. CIGNA misled participants into believing that all of their accrued benefits under the pre-conversion plan would be reflected in the cash balance opening accounts and that they would accrue additional benefits under the cash balance plan without "wear away" periods. The court's remedy corrected both of those misrepresentations by requiring CIGNA to pay benefits using the "A plus B" approach, under which participants receive both their accrued benefits under the pre-conversion formula (Part A), frozen as of the date of the conversion, and the new benefits provided by the cash balance formula (Part B). Pet. App. 196a; see p. 4, *supra*. Moreover, the court's remedy gave participants precisely what Congress now requires an employer to provide when it converts to a cash balance plan. See *ibid.* (describing PPA, 29 U.S.C. 1054(b)(5)(B)(iii)).

The Amara petitioners contend (09-784 Pet. 23-26) that the district court abused its discretion in declining to provide additional relief for CIGNA's statement in the SMM that the cash balance plan would provide benefits "comparable" to the benefits under the traditional plan. But the Amara petitioners conceded in the district court that the court's remedial authority did not extend to rewriting the terms of the plan. See Pet. App. 201a. The district court therefore did not abuse its discretion in declining to rewrite the plan to comply with the vague promise of "comparable" benefits. *Ibid.* Moreover, the "A plus B" approach that the court ordered as a remedy for CIGNA's other misrepresentations, although it did not provide benefits identical to those under the pre-

conversion plan, provided substantial relief for any violation based on a promise of "comparable" benefits.

The Amara petitioners also contend (09-784 Pet. i, 15-23) that the district court erred because it purportedly concluded that it lacked authority to reinstate the pre-conversion formula as a remedy for CIGNA's Section 204(h) violation. Contrary to that contention, the court understood that it had the authority to reinstate the pre-conversion formula, Pet. App. 187a-191a, but it "determine[d], in an exercise of its equitable powers," that reinstatement was "not an appropriate remedy," *id.* at 191a. The court reasoned that reinstatement would have required the invalidation of the initial amendment freezing benefits under the pre-conversion plan, which the Amara petitioners had not independently challenged, and that the "A plus B" remedy already provided substantial relief. *Id.* at 188a-189a, 192a.

As the Amara petitioners recognize (09-784 Pet. 15), a district court has broad discretion to determine the appropriate remedy for ERISA violations. The district court did not abuse that discretion here. In any event, even if the court misunderstood the scope of its remedial authority under the version of Section 204(h) then in effect, Congress has since amended that provision to address expressly the available remedies. See p. 2, *supra* (citing 29 U.S.C. 1054(h)(6)). Whether the district court misapprehended the remedies available under the prior version of Section 204(h) is thus of little continuing importance.

The issues raised by the Amara petition do not warrant this Court's review.

C. The Court Need Not Grant, Vacate, And Remand In Light Of *Conkright*

In its recent decision in *Conkright*, this Court held that an administrator with discretionary authority to interpret a plan, who makes a "single honest mistake in plan interpretation," is entitled to deference for "subsequent related interpretations of the plan." 130 S. Ct. at 1644. Contrary to the suggestions of the respective petitioners—which were made before the decision in *Conkright* and were therefore necessarily speculating about its impact—the Court need not grant, vacate, and remand (GVR) this case for further consideration in light of that decision.

CIGNA contended (Pet. 24-26) that a GVR would be warranted because the lower courts did not defer to the remedy that CIGNA proposed for its ERISA violations. But CIGNA did not ask the district court to defer to its remedial proposal as a matter of plan interpretation. Instead, CIGNA argued, without asking for deference, that the proposal was supported by the testimony of the participants' expert. See Pet App. 197a-198a; Defs.' Mem. on Individual Issues and Class Relief 27; Defs.' Resps. to the Court's Apr. 30, 2008, Inquiries 5. And, in the court of appeals, CIGNA did not even request the court to adopt the remedy it had proposed in the district court, much less ask for deference. See CIGNA C.A. Br. 2-61. Accordingly, CIGNA has not preserved any claim to which *Conkright* is pertinent.

As for the Amara petitioners, their request for relief based on *Conkright* was premised on the supposition that it would address the scope of a district court's "allowable discretion" in fashioning ERISA remedies. 09–784 Pet. 13. To the extent *Conkright* addresses that question, however, it holds only that the district court

must in some circumstances defer to an administrator's plan interpretation. That holding provides no basis for any further relief for the Amara petitioners. A remand in light of *Conkright* is therefore not warranted.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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